BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID DEVORSS Claimant	)	
VS.	)	
GOODYEAR TIRE & RUBBER CO. Respondent	)	Docket No. 1,011,373
AND	)	
LIBERTY MUTUAL INSURANCE CO. Insurance Carrier	)	

ORDER

Claimant requested review of the November 17, 2005, Award entered by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on February 14, 2006.

APPEARANCES

George H. Pearson, of Topeka, Kansas, appeared for the claimant. John A. Bausch, of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties agreed that the February 17, 2004, and the February 24, 2004, reports of the court-ordered independent medical examiner, P. Brent Koprivica, M.D., should be part of the record and may be considered by the Board. Dr. Koprivica's August 9, 1999, report, respondent's Exhibit 1 to the August 19, 2005, deposition of Edward Prostic, M.D., was also made a part of the record by the agreement of the parties during oral argument to the Board. Finally, on March 29, 2006, the parties filed a Joint Stipulation that established claimant's gross preinjury average weekly wage, including fringe benefits, as $1,065. The parties also stipulated therein that claimant reached maximum medical improvement (MMI) on January 30, 2005.

ISSUES

The Administrative Law Judge (ALJ) found claimant had failed to meet his burden of proof and is not entitled to any workers compensation benefits.

Claimant argues the evidence and law support a finding that he met his burden of proving that he suffered a work-related aggravation of his preexisting lumbar spine disk disease and his condition is compensable. Claimant contends that Dr. Edward Prostic's conclusion that claimant suffered increased functional impairment is more sensible than Dr. Phillip Baker's opinion that he suffered no additional functional impairment than what he had in 1999. Claimant also asserts that he is entitled to a work disability even if Dr. Baker's opinion is accepted as true because he now has restrictions that he did not have before this accident.

Respondent and its insurance carrier (respondent) assert that claimant did not suffer an accidental injury arising out of and in the course of his employment and that there is no credible medical evidence that he suffered any permanent impairment and/or work disability. Respondent requests that the ALJ's Award be affirmed in its entirety.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant had been employed by respondent as a banbury helper since 1994. On April 4, 2003, respondent had a particularly heavy run on the banbury machine. Claimant was required to lift 40-pound bags throughout the entire eight hour shift. At about 4 or 5 a.m., during his 11 p.m. to 7 a.m. shift, claimant's back started burning. He testified:

> I don't believe it was any one incident that injured the back at the time. It's not like I walked over and picked up one bag of Code 1 and at that exact minute–had it been that way, I would have went right into the dispensary at that particular time. I think it was just the workload for the whole case–for that whole night as a whole.[1]

Claimant did not report the injury to his supervisor before leaving work because he had a previous back condition and had been told that the discomfort was something he would have to live with. As such, he did not go to the dispensary every time he had discomfort. However, on April 4, 2003, he went home and went straight to bed. When he awoke at 3 or 3:30 p.m., he was in pain and could not stand up straight. Since

[1]P.H. Trans. (Aug. 20, 2003) at 11.

respondent's company doctor is not in on Fridays or Saturdays, he visited his own chiropractor, Dr. Michael Brady.

Dr. Brady's medical records of April 5, 2003, indicate that claimant came into his office complaining of low back pain that had started two weeks earlier. At the Preliminary Hearing held August 20, 2003, claimant stated that Dr. Brady put him on light duty at work. However, the ALJ noted that Dr. Brady's work limitation slip showed that he had marked a box that indicated the "Recommendation is . . . non-occupational."[2] The ALJ interpreted this to mean that Dr. Brady was stating that the injury was not related to claimant's work. Claimant argued that Dr. Brady's notation meant he did not want claimant working in respondent's plant.

When claimant returned to respondent the following Monday, April 7, he reported the injury to his supervisor and told him he could not work until he was released by the doctor. Respondent denied his request to see the company doctor and fill out an accident report. The next day claimant returned to respondent, at which time he was given a disability card, told to call the insurance carrier to apply for accident and sickness (A&S) benefits, and told not to return until he was ready to go back to full-time work. Claimant testified that on April 9, 2003, the union forced respondent to let him come back and file an accident report. However, he applied for A&S benefits and received them for five months.

On August 20, 2003, the ALJ entered an order that claimant be seen by an independent medical examiner, Dr. P. Brent Koprivica. Dr. Koprivica had previously examined claimant on August 9, 1999. After examining claimant on February 17, 2004, Dr. Koprivica stated that it was "probable that [claimant] has sustained cumulative injury as a result of his ongoing employment activities" through April 4, 2003.[3] Dr. Koprivica noted that on February 17, 2004, claimant had a significant reduction in lumbar motion as compared to his August 9, 1999, examination. Dr. Koprivica also said claimant was temporarily and totally disabled from work and in need of additional medical treatment. At that time, claimant had not reached MMI and so Dr. Koprivica did not say whether claimant's injuries were permanent.

Claimant eventually went to Dr. Glenn Amundsen for treatment. Dr. Amundsen released him to light duty in October 2004 with restrictions of 20-pounds lifting, no bending, no twisting and no long-time standing or sitting. At that time, claimant went to his union about going back to work for respondent. Claimant received word that respondent had declined to allow him to return to work, and he did not pursue reemployment with

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[2] *Id*., Cl. Ex. 2.

[3] Dr. Koprivica's report dated Feb. 17, 2004, at 10.

respondent any further. Claimant last saw Dr. Amundsen on December 8, 2004, at which time they discussed a diskogram and possible surgery. Claimant decided against surgery.

In March 2004 claimant started working as an independent contractor with Kaw Valley Hardwood Floors (Kaw Valley). He was paid strictly on commission. On April 5, 2005, claimant became a full-time employee of Kaw Valley, working as a salesman. He earns $300 per week plus commissions. He receives no fringe benefits. Claimant's commissions earned after April 5, 2005, through September 28, 2005, totaled $11,460.02. Divided by 25 weeks, this amounts to $458.40. Accordingly, claimant's post-accident average weekly wage appears to be $758.40.

Claimant has had significant long-term back problems. He suffered an injury to his back while installing carpet sometime before he started working for respondent. In 1995, while working for respondent, he hurt his low back. In 1998, he again suffered a low back injury while working for respondent. However, he testified that he was released from treatment for the injuries in 1998 and, after doing light duty work for a couple of months, was able to return to full duty work with no restrictions or accommodations.

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant at the request of claimant's attorney on March 28, 2005. He reviewed medical records of Dr. Koprivica and the report of an MRI taken June 22, 2004. The MRI showed significant degeneration at L5-S1. There was disc space narrowing at L5-S1. There was haziness of the sacroiliac joints and squaring of the lower lumbar vertebrae. At one point, Dr. Prostic opined that claimant sustained a permanent impairment as a result of his work-related accidents through April 4, 2003, but he also testified that he could not say whether claimant's work-related aggravation was permanent or temporary.

Using the AMA *Guides*[4], Dr. Prostic rated claimant as having a 15 percent permanent partial impairment of the body as a whole based on a combination of the diagnosis related estimate (DRE) Model and the Range of Motion Model. He stated claimant was at a stable plateau in healing. Dr. Prostic could not say how much of claimant's impairment was preexisting. Nor could he say how much of claimant's impairment was attributable to the series of accidents ending April 4, 2003.

Dr. Prostic recommended that claimant be only at light-medium level activities and avoid frequent bending or twisting at the waist, forceful pushing or pulling or use of vibrating equipment. Claimant should lift no more than 30 pounds occasionally and 10 to 15 pounds frequently. Dr. Prostic reviewed a task list prepared by Dick Santner consisting of 13 job tasks. Dr. Prostic opined that of the 13 tasks, claimant could no longer perform 6 of them for a 46% task loss.

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[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Prostic attributes claimant's task loss to his work-related accident or series of traumas on or ending April 4, 2003.[5] However, because of claimant's loss of motion and loss of chest expansion, Dr. Prostic was suspicious that claimant has spondyloarthropathy, which is complicating his recovery. The spondyloarthropathy started before the 2003 accident. The squaring of the lower lumbar vertebrae and haziness at sacroiliac joints were also not caused by lifting on the job. The narrowing of disc space was probably caused or contributed to by his lifting at respondent, but not necessarily the lifting that occurred on April 4, 2003. The disc narrowing is at least partially caused by his previous back injuries.

Dr. Prostic did not know that Dr. Koprivica had given claimant a 15 percent impairment because of a strain or sprain of the low back in 1999. Dr. Prostic testified:

> My belief is that subsequent to the rating report by Dr. Koprivica if I accept his range of motion as being true at that time, he has at least seven or eight percent additional permanent impairment that has occurred since then. I am unable to say with certainty how much of that is due to . . . the April 4, 2003 accident and how much to spondyloarthropathy. The likelihood is some is from each.[6]

Dr. Phillip Baker is a board certified orthopedic surgeon. He first saw claimant on October 26, 1999, for an evaluation of claimant's 1998 low-back injury at respondent. At that time, Dr. Baker rated claimant with a 5 percent impairment of the whole body based on the AMA *Guides*. Dr. Baker did not recommend any work restrictions at that time, but he did recommend claimant see a rheumatologist.

Dr. Baker examined claimant at the request of respondent on July 12, 2005. After his examination of claimant on that date, Dr. Baker diagnosed claimant with ankylosing spondylitis, a rheumatologic or arthritic condition commonly occurring in males from late teens to 45 years of age. The cause is unknown but it affects the joints of the spine. Dr. Baker gave this diagnosis because claimant has reduced chest expansion, sclerosis of the sacroiliac joints, positive HLA-B27 antigen study, and is a young male with lots of pain and stiffness in his back, all of which are symptoms of ankylosing spondylitis. This condition is not work-related. He gave claimant a 5 percent impairment rating, which is the same 5 percent he gave him in 1999. After reviewing Mr. Santner's task list, Dr. Baker opined that claimant was unable to perform 5 of the 13 tasks listed.

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[5]Dr. Prostic refers to both a series of accidents over a period of time and also a single traumatic event on April 4, 2003. Claimant alleged an accident date of "April 4, 2003 to present" in his Form K-WC E-1 Application for Hearing filed July 1, 2003. At the Regular Hearing, a single date of accident on April 4, 2003, was alleged.

[6] Prostic Depo. at 28-29.

Dr. Baker stated that claimant's job as a banbury helper might aggravate his symptoms and make him hurt. However, Dr. Baker said that was different than aggravating the condition. Dr. Baker also stated that if claimant's work was too light, his condition would be worse.

When asked about restrictions, Dr. Baker stated: "Put him at 50 pounds and let him work, and I would encourage him to be active."[7] Dr. Baker admitted that when he saw claimant in 1999 he placed no restrictions on him and now he feels a 50-pound limit would be appropriate. However, he explained that the 50-pound limitation is to keep claimant comfortable and is separate from what claimant can do.

Dick Santner, a vocational rehabilitation counselor, visited with claimant at the request of claimant's attorney on April 7, 2005. The purpose of the visit was to determine claimant's work tasks for the 15 years prior to April 4, 2003. The task list he and claimant prepared contained 13 tasks. He was not asked to render an opinion as to what claimant could now expect to earn in the open labor market.

The ALJ concluded that claimant had failed to meet his burden to establish a causal connection between his ongoing complaints and his work activities. The Board has considered the evidence contained within the record and finds the ALJ's conclusion should be affirmed as to permanent partial disability compensation but modified as to temporary disability and medical benefits.

While it is uncontroverted that claimant sustained previous low back injuries, the evidence contained within the record supports claimant's contention that his work with respondent caused, at a minimum, a temporary aggravation of his underlying condition. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[8] The test is not whether the job-related activity or injury caused the condition, but whether the job-related activity or injury aggravated or accelerated the condition.[9] Accordingly, claimant's claim is compensable.

The Board finds claimant suffered personal injury by accident arising out of and in the course of his employment with respondent through April 4, 2003. However, claimant has failed to prove that the work-related aggravation of his preexisting condition is

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[7]Baker Depo. at 42-43.

[8]*Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[9]*Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

permanent. Dr. Prostic was unable to say what percentage, if any, of his permanent impairment of function is attributable to his work activities in this docketed claim versus a natural progression of his preexisting injuries and his personal, non-work-related condition. Accordingly, claimant likewise has failed to prove to what extent his wage and task loss is due to his most recent work related aggravation, and permanent partial disability compensation based upon either claimant's percentage of functional impairment or work disability is denied. However, claimant is entitled to an award consisting of the authorized and related medical treatment expenses incurred between April 4, 2003, and January 30, 2005, the temporary total disability compensation previously paid, and unauthorized medical up to the statutory maximum.[10]

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated November 17, 2005, is reversed and an award of compensation is made in favor of claimant and against respondent and its insurance carrier for an accidental injury which occurred on April 4, 2003, and based upon an average weekly wage of $1,065 and a compensation rate of $432 per week for temporary total disability compensation until January 30, 2005, and payment of past medical treatment expenses, authorized and unauthorized.

The claimant is entitled to temporary total disability compensation from April 5, 2003, to January 29, 2005, inclusive, a period of 95.14 weeks, at the rate of $432 per week, making a total award of $41,100.48, which is ordered paid in one lump sum less amounts previously paid.

Reporter's fees are assessed as costs against respondent and its insurance carrier as itemized in the ALJ's Award.

The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536 requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the ALJ for approval.

IT IS SO ORDERED.

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[10]The ALJ's November 17, 2005, Award contains "Stipulations" that "[t]emporary total disability compensation has been paid in the amount of $46,345.95," "[n]o additional dates of temporary total disability are claimed," and "[n]o dates of temporary partial disability are claimed."

Dated this _____ day of April, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

I respectfully dissent from the majority as I believe claimant permanently injured or permanently aggravated his low back due to the heavy, repetitive lifting he performed working for respondent. I believe the medical opinions from Dr. Koprivica and Dr. Prostic are more persuasive than Dr. Baker's. As indicated above, Dr. Koprivica determined claimant sustained a cumulative injury to his low back due to his work activities. And Dr. Prostic concluded claimant aggravated degenerative disc disease at L5-S1 but he also has spondyloarthropathy (arthritis) in his spine that is a barrier to his recovery.

In short, claimant had a weakened back that was further injured by his work. And due to that work-related injury, claimant has lost the ability to perform some of his former work tasks and, moreover, has lost his job with respondent. Consequently, claimant should be awarded permanent partial general disability benefits in this claim.

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BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
John A. Bausch, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director